STATE OF MICHIGAN

IN THE SUPREME COURT

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WOLD ARCHITECTS and ENGINEERS,

Plaintiff / Appellee,

Supreme Court Docket No. 126917
C/O/A Docket No. 246874

v

L/C Civil Action No. 02-044483-CK
Hon. Steven N. Andrews
(Oakland County Circuit Court)

THOMAS STRAT and STRAT and ASSOCIATES, INC.,

Defendants / Appellants.

APPELLANTS' THOMAS STRAT AND STRAT AND ASSOCIATES, INC.'S REPLY TO COUNTER-STATEMENT OF FACTS

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REPLY TO COUNTER-STATEMENT OF FACTS

Contrary assertions by the Appellee aside, Strat's Statement of Facts is accurate and is supported by the record. Those facts which play into the basis for the negotiation of the underlying contracts are largely irrelevant to the legal issues at hand, and are offered only as background.

Relative to the conduct which may establish the basis for Strat's estoppel arguments, the fact that the AAA commenced administration of the dispute under its commercial dispute resolution procedures, by letter dated February 12, 2002, is not disputed.[1] The fact that the Appellee voluntarily participated in those proceedings, asserted a counterclaim, and conducted discovery therein is not disputed. Finally, the fact that the Appellee did not revoke its obligation to Arbitrate until October 8, 2002, long after the foregoing had occurred, is not disputed. The Appellee pays only cursory homage to these facts, and the Court should therefore consider them established.

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[1] For example, the Appellee ***argues*** in its statement of facts ". . . at the time of the acquisition, the design and development phases of Macomb County Project were not complete," and that " . . . Strat had significantly over-billed the Macomb County project to their client, forcing Wold to complete more of the Macomb County project with less fee." (Appellee's Brief at pages 1-2). In support of those propositions, the Appellee cites its own appendix at pages 4b and pages 3b-5b, respectively. When one reviews the Appendix however it is apparent that the Appellee's authority for these "facts" is its own Circuit Court Complaint. These "facts" are therefore at best the Appellee's version of the events, since simply alleging something does not establish that something as fact. Notably, the Appellee fails to identify these allegations as "alleged fact," opting instead to represent them as established fact. However, Strat declines the invitation to follow the Appellee's lead and suggest that the Counter-Statement of facts be dismissed as argumentative, and urges the Court to, instead, focus on what actually is in dispute and not the largely irrelevant events that led up to the dispute.

REPLY TO ARGUMENT

The Appellee raises several arguments. Those that touch on the substance of Strat's appeal are addressed hereinafter in turn:

A. Strat does not Suggest that this Court Presume Legislative Intent to Alter Common Law

The Appellee cites **Gruskin v Fisher, 70 Mich App 177; 245 NW2d 427 (1976)**, for the proposition that the Court may not ***presume*** legislative intent to alter common law.[2] However, **Gruskin *does not*** stand for the proposition that the legislature must ***expressly*** state intent to alter common law. Rather, that intent can be inferred from the substance of the legislation at issue. Where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended the statute supersede and replace any common law dealing with that same subject matter, **2A Sands Sutherland Statutory Construction (4th ed), § 50.05, pp 440-441, Millross v Plum Hollow Golf Club, 429 Mich 178; 413 NW2d 17 (1987), at 183.**

Strat merely invites this Court to employ that principle and evaluate the Michigan Arbitration Act to determine whether legislative intent to preempt common law arbitration is indicated. Although Strat set out a detailed analysis in its Brief in that regard, the

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[2] That particular case was subsequently reversed by this Court in **Gruskin v Fisher, 405 Mich 51, 273 NW2d 893 (1979)**. The general principles do however remain largely intact.

Appellee has failed to address it. Strat believes that when this Court applies the proper standard, the proclivity of its argument becomes apparent.

B. This Case Presents Issues of First Impression in Michigan

The Appellee argues that for a variety of reasons the cases Strat cites lend " . . . no support for a contention that common law arbitration agreements should be preempted by the MAA." (Appellee's Brief at page 14). While the Court of Appeals has addressed this issue and has mechanically followed what Strat believes is flawed precedent, (a proposition which the Court of Appeals has itself expressed at times) there is no precedent which addresses the question of whether the Michigan Arbitration Act preempts common law. Thus, the primary reason for this appeal.

The Appellee accuses Strat of "misunderstanding" **Millross** (Appellee's Brief at page 14). To the contrary, Strat understands that **Millross** is useful only for the general rule, and that the facts at issue there have no application here. The Appellee contends that **Millross** is inapplicable because the Dramshop Act at issue there concerns the creation of a new right. Indeed, sale of liquor to a visibly intoxicated person was not a recognized cause of action at common law, and the Dramshop Act did create that cause of action. The **Millross** Court engaged in the proper analysis and concluded that while the Dramshop Act created an exclusive remedy against a liquor licensee for claims arising out of the act of providing liquor to a third party, it ***did not*** preempt other common law causes of action such as negligent supervision, etc. The conclusion in **Millross** is not as simple

as the Appellee suggests, nor is it so easily dismissed.

Although Michigan Courts have not addressed the specific question presented here, they have established criteria for addressing the issues that does find application here (specifically, the general methodology that should be employed in the course of addressing the issue as framed here - see **Millross, supra.**). The Appellee completely fails to analyze the Michigan Arbitration Act in light of that criteria. Instead, the Appellee simply advances the bald proposition that the MAA does not preempt common law arbitration principles. When that analysis is conducted however, the contrary conclusion is indicated.

C. Common Law Arbitration Principles no Longer exist in Michigan

The Appellee cites **Hetrick v Friedman, 237 Mich App 264; 602 NW2d 603 (1999)** for the proposition that "common law" and "statutory" arbitration coexist under Michigan law. Two things are plain from the **Hetrick** opinion; 1) the opinion itself does not turn on the question presented here since the **Hetrick** Court found that the Arbitration Agreement at issue provided for statutory Arbitration; and 2) the **Hetrick** Court was highly critical of the unilateral revocation rule, but was nevertheless bound by it as controlling precedent. This Court is not bound by that prior precedent, and is free to render a ruling that is consistent with the legislative intent that underpins the MAA. Likewise, to the extent it is necessary for this Court to depart from common law to render a result that is consistent with the principled development of Michigan law, unlike the Court of Appeals, this Court is

free to do that.[3] The fact that the Court of Appeals in **Hetrick** found the common law controlling therefore does not advance the issues presented here.

D. Preemption of Common Law Arbitration Principles does not Render any Arbitration Agreements Unenforceable

The Appellant argues that if common law arbitration principles are deemed preempted, Strat is left with an unenforceable contract. To the contrary, as Judge Saad noted in **Hetrick, supra**, "We would therefore enforce common-law arbitration agreements on the same terms as any other contract . . ."[4] Thus, preemption of common law arbitration principles does not render common law arbitration agreements unenforceable. Rather, it simply provides for their enforcement on the same terms as any other contract.[5]

E. The Anti-Modification and Waiver Clause was Itself Modified and/or Waived

The Appellant cites **Quality Products and Concepts Co v Nagle Precision Inc, 469 Mich 362; 666 NW2d 251 (2003)** in support of the proposition that the anti-modification and waiver clause in the Contract prevents modification and waiver. As the

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[3] "Common law" is another way of saying "judge made" law. Judges made it, and when the circumstances warrant, judges can change it.

[4] Presuming the **Hetrick** Court saw the precise issue presented and presuming it was not bound be contrary precedent, one can conclude that the **Hetrick** Court would have reached that result.

[5] Indeed, that argument is borderline nonsensical. Commercial contracts as a rule do not include language that provides that they can be enforced in Court, yet they of course can be. Preemption of common law Arbitration concepts simply means that Arbitration agreements would be subject to those same general contract principles.

Quality Products Court made plain however, ". . .parties to a contract are free to *mutually* waive or modify their contract notwithstanding a written modification or anti-waiver clause". Thus, the inquiry again turns to the conduct of the Appellee to determine whether that conduct constitutes a waiver of that clause. A review of that conduct manifests the Appellee's intent to Arbitrate (at least for the first 7 months), which constitutes a waiver.

F. If the Court Concludes that the Michigan Arbitration Act Preempts Common Law Arbitration Principles, that Conclusion Should be Given Full Retroactive Effect

The Appellee next argues that should the Court should afford that ruling only prospective effect. This position cuts against the prevailing notion that absent extreme circumstances, any modifications to the common law should be given full retroactive effect. The applicable principle was most finely distilled in **Gladych v New Family Homes, 468 Mich 594; 664 NW2d 705 (2003)** where the Court noted:

> Although the general rule is that judicial decisions are given full retroactive effect, **Hyde v Univ of Michigan Bd of Regents, 426 Mich 223; 393 NW2d 847 (1986)**, a more flexible approach is warranted where injustice might result from full retroactivity, **Lindsey v Harper Hosp, 455 Mich 56; 564 NW2d 861 (1997)**.

Thus, unless full retroactivity would work an injustice, the presumption must be in favor of a fully retroactive result.

Here it is apparent that full retroactivity will work no injustice. The entire record is completely and utterly devoid of even the slightest suggestion that the process was somehow biased or unfair. By contrast, in **Apsey v Memorial Hospital, 266 Mich App 666; ___ NW2d ___ (2005)**, the sole case the Appellee cites in support of its position

(where the issue presented concerned the proper method for notarizing affidavits), the Court found:

> Retroactive application would result in the dismissal of a large number of otherwise meritorious medical malpractice claims. Our Supreme Court has recognized that "resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy", **Riley v C & H Industries 431 Mich 632, 644-645; 433 NW2d 787 (1988)**.

It is obvious that where retroactive application will extinguish a number of otherwise valid claims due to mere technical irregularities, a substantial injustice would be wrought. It is equally obvious that where the aggrieved party has not even suggested that he or she would somehow receive less than full and fair consideration of their claims if full retroactive application is afforded, there is no basis for the conclusion that any justice would occur. In the absence of injustice, and the record does not found the basis for any such argument, the presumption in favor of full retroactivity effect must applied.[6]

G. Dismissal of Balance of the Appellee's Complaint was Proper

The Parties entered into a series of writings that evidenced their transaction. Various components of those writings had differing provisions, the principal one being the

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[6] The Appellee does make much of the notion that parties can easily craft agreements that comport with it believes is required under the MAA to render an Arbitration Agreement "statutory". If all parties consulted with Attorneys prior to entering into contracts, they might well take such steps (as well as several others). The proposition that any specific language is necessary to create any specific effect has long been rejected by general principles of contract law in favor of a broad rule to the effect that the parties are bound by what they expressed in their writing, and not by certain usages of specific words. Strat's position is simply that the rule should find equal application here.

Appellees' obligation to pay Mr. Strat compensation as he continued in the Appellee's employ. When the Appellee failed to pay that compensation, Strat demanded Arbitration, and the Appellees' response was that it was could withhold compensation because Strat allegedly misrepresented the status of completion of certain projects that were part of the acquired assets. The Appellee therefore argues the claim arose under the Asset Purchase Agreement, which did not contain an arbitration provision. Even adopting that tortured logic, a basic fact still remains - the Employment Agreement does contain the arbitration provision, and employee Strat earned compensation which the Appellee refused to pay.[7]

The Trial Court simply concluded that the claim was arbitrable, and that the Appellee's "claim" was really a counterclaim in which the Appellee asserted a right to relief relative to the same funds Strat sought.[8] As the Court concluded the claim was arbitrable

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[7] The Appellee cannot alter the character of Strat's claim by asserting what is in effect a counterclaim. Indeed, if the Appellee believes that Strat made any misrepresentations in the context of any of the transactions, the proper remedy would be to file suit or demand Arbitration while perhaps holding the disputed funds in escrow in the interim. Notably, none of those things occurred. Instead, the Appellee simply concluded that its views were correct, and then resorted to self help and withheld those funds that were necessary to satisfy what was effectively a self adjudicated claim. Although the Appellee argues it is entitled to retain those funds "under the Asset Purchase Agreement", and that the claim in that regard is not arbitrable, to this day it has undertaken absolutely no affirmative effort to vindicate or validate that view.

[8] If the Appellee's position is correct, in the context of a multi-document transaction, the Court effectively must evaluate each claim and counterclaim a party and that party's opponent may lodge, decide what portion(s) are arbitrable, sends those portion(s) that are to Arbitration and conduct a concurrent trial on those portion(s) that are not. Notably, the Appellee's counter demand for Arbitration was identical to the complaint it contends the Court improperly dismissed.

(and indeed, was in fact arbitrated and adjudicated), dismissal was proper.

H. There is no Manifest Error of Law Apparent on the Face of the Arbitration Award

Finally, the Appellee argues that the Arbitrator exceeded his authority in awarding attorney fees. This argument ignores the applicable legal standard in its entirety. An arbitration award may be vacated ***only*** where the Arbitrator(s) committed an error of law, ***that is apparent on the fact of the Award***, **St Luke's Hospital v SMS Computer Systems Inc, 785 F Supp 1243 (ED Mich, 1991)**. The standard is most finely distilled in **DAIIE v Gavin, 416 Mich 407; 331 NW2d 418 (1982)**:

> ***Where it clearly appears on the face of the award*** or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, the award and decision will be set aside, [**Quoting Howe v Patrons' Mutual Fire Ins Co of Michigan, 216 Mich 560; 185 NW 864 (1921)**], **Gavin, supra at 443**.

In addition, as the Court noted in **Gordon Sel-Way Inc v Spence Bros Inc, 438 Mich 488, 495; 475 NW2d 704 (1991)**.

> **MCR 3.602** provides a circuit court with only three options when an arbitration award is challenged: it may (1) confirm the award, (2) vacate the award if obtained through fraud, duress, or other undue means, or (3) modify the award to correct errors that are apparent on the face of the award, **MCR 3.602(I)**, **(J)**, and **(K)**.

In the absence of a serious error of law, ***apparent on the face of the award***, the Trial Court ***must*** enter judgement on the award.

Notably absent from the Appellee's argument, is any discussion of what appears on the face of the Award. While the Appellee argues that the effect of various documents is

other than that effect afforded them by the Arbitrator, the Appellee has failed completely to address the question within the context of the applicable standard - specifically how those terms appearing ***on the face of the award*** somehow manifest an error of law. The parties did not idly execute a security agreement. Instead, they intended that security agreement to secure something. The Arbitrator obviously determined the performance of the balance of the obligations of the transaction were the subject of that security, and absent an error of law, that conclusion can not be disturbed by the Court. The Appellee has therefore failed completely to address the legal question presented.

CONCLUSION

The Appellee has failed completely to address the substance of those issues raised in this Appeal. Strat accordingly reiterates its request for relief as set out in detail in its Brief in the main.

Respectfully submitted,

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Dated: 9/20/05

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